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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1559

JAMES P. LINN,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1975

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Tenth Circuit in the case of *United States of America* v. *James P. Linn*. The judgment was entered on April 9, 1975. Rehearing was denied on May 12, 1975.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals denying the petition for rehearing is reproduced as Appendix A to this petition. The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported and is reproduced and appended hereto as Appendix B. The order of the United States District Court for the Western District of Oklahoma is not yet reported and is appended hereto as Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28 United States Code (U.S.C.), § 1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on April 9, 1975. A petition for rehearing was timely filed and was denied on May 12, 1975, by the United States Court of Appeals for the Tenth Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the order denying Petitioner's motion to expunge or alternatively seal his arrest record deprives him of his fundamental right of privacy and liberty in violation of the Fifth Amendment concept of personal liberty and the Bill of Rights as a whole.

2. Whether the United States Court of Appeals for the Tenth Circuit should have remanded the case for an evidentiary hearing.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

A. Amendment V, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

B. Title 28, United States Code (U.S.C.) § 534:

"(a) The Attorney General shall—

"(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

"(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

"(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

"(c) The Attorney General may appoint officials to perform the functions authorized by this section."

C. Title 28, Code of Federal Regulations (C.F.R.) § 0.85 (fully set out in Appendix D) especially subsection (b), set forth below:

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"Subject to the general supervision and direction of the Attorney General, the Director of the Federal Bureau of Investigation shall:

". . . (b) Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reserve System, FDIC—Reserve—Insured Banks, and banking institutions insured by the Federal Saving and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies."

STATEMENT OF THE CASE

James P. Linn, Petitioner, an attorney-at-law licensed to practice in the State of Oklahoma and in the State of Texas, and seven others were indicted by a grand jury sitting in the Southern District of New York. The indictment contained sixty-five counts, charging, among other things, conspiracy, mail fraud, wire fraud, stock fraud, sale of unregistered securities, and the filing of false reports with the Securities and Exchange Commission and the American Stock Exchange. The Petitioner was a named defendant in fifty-nine of the sixty-five counts in the indictment.

Subsequent to the return of the aforesaid indictment, Petitioner was arrested and fingerprinted by the United States Marshal for the Southern District of New York.

Petitioner and four other defendants requested and were granted a change of venue to the Western District of

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Oklahoma. Trial of the case was to a jury, and of the fifty-nine counts naming Petitioner as a defendant, nine were submitted to the jury. The remaining counts were either dismissed or consolidated with the nine counts submitted to the jury.

On February 7, 1974, the jury acquitted Petitioner on each of the nine counts submitted to it. Petitioner then filed in the criminal proceeding in which he had been acquitted a motion requesting the trial court to expunge, remove and destroy, or alternatively seal, the record of his arrest.

In this motion Petitioner alleged as grounds therefor: (1) that most of the charges against him had been dismissed prior to and during trial; (2) that he had been acquitted by the jury on all remaining counts of the indictment against him; (3) that future misuse and improper dissemination of his arrest record was likely; (4) that the record of his arrest could be used to attack his character and reputation both as an individual and in his professional capacity as an attorney-at-law; (5) that his arrest record nowise serves to protect society, so that any conceivable public interest in retaining the record of arrest is clearly outweighed by the possible adverse consequences to him and his professional practice; and (6) that expungement of the record of arrest is necessary to insure his constitutional right of privacy.

The Petitioner requested that should the District Court deem that more material or evidence was necessary for a just determination of the motion, he be granted an evidentiary hearing. No evidentiary hearing was granted or held. On May 29, 1974, the District Court denied Petitioner's motion to expunge his record of arrest (Appendix C).

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An Appeal to the United States Court of Appeals for the Tenth Circuit was properly perfected, briefs were submitted and oral arguments heard. On April 9, 1975, the United States Court of Appeals for the Tenth Circuit affirmed the action of the trial court (Appendix B).

A Petition for Rehearing was filed on April 25, 1975, seeking a remand for an evidentiary hearing. The rehearing was denied by order of the United States Court of Appeals for the Tenth Circuit on the 12th day of May, 1975 (Appendix A).

THE QUESTION IS SUBSTANTIAL

The present petition for writ of certiorari presents an important and unresolved constitutional question which has not been but should be determined by this Court. A decision by this Court is needed, particularly where federal law and procedure followed by the Federal Bureau of Investigation and other data assemblying agencies provides a wholly inadequate means of safeguarding important constitutional rights.

There is a growing body of conflicting decisions among state and federal courts in the area of expunging arrest records under the theory of a constitutionally guaranteed or protected right of privacy.

In addition, the substantive issues in this case are novel issues of national import, affecting the lives of many thousands of American citizens each year who have been arrested and subsequently acquitted of the crimes charged.

ARGUMENT

In the remainder of this petition for writ of certiorari, Petitioner will show that the question presented is substantial and merits review by the Court. Because of the novelty and complexity of the issue, and the limited function of the petition for writ of certiorari, this petition will not undertake to develop all arguments in depth.

I.

THE ORDER DENYING PETITIONER'S MOTION TO EXPUNGE OR ALTERNATIVELY SEAL HIS ARREST RECORD DEPRIVES HIM OF HIS FUNDAMENTAL RIGHT OF PRIVACY AND LIBERTY IN VIOLATION OF THE FIFTH AMENDMENT CONCEPT OF PERSONAL LIBERTY AND THE BILL OF RIGHTS AS A WHOLE.

A. The collection and dissemination of records of arrest by the Federal Bureau of Investigation.

The Federal Bureau of Investigation, Identification Division, through the authority vested in the Attorney General and the Director of the Federal Bureau of Investigation under 28 U.S.C. § 534 and 23 C.F.R. § 0.85(b) respectively, maintains a criminal file for identification records, fingerprints and records of arrest. Federal, state and local law enforcement agencies submit fingerprints and arrest records of arrested persons or suspects in order to receive information on those persons' prior criminal activities. The Bureau reports such information and adds any new information received through its files. The Division also receives hundreds of "name check" requests from contributing and non-contributing sources asking for criminal records of individuals by name without submitting any

individual fingerprints. Where possible and when the inquirer gives what the FBI considers a legitimate reason for the request, the inquiry is processed and the record disseminated. Any local or state official is considered to be authorized to receive this information if he has something to do with law enforcement or if he is authorized by statute, ordinance or rule to fingerprint applicants for employment or for a permit or a license. Congressmen are also authorized. The division maintains a current list of contributing or participating agencies which numbers between 7,000 and 8,000, of which only 3,750 are local law enforcement agencies. See *Menard* v. *Mitchell*, 328 F.Supp. 718 (D.C. 1971) at pp. 720-23 and *Menard* v. *Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), for excellent discussions of the operation of the Identification Division.

The Division has little opportunity to supervise what is actually done with the arrest records it disseminates. It is apparent that the local agencies may on occasion pass on this information to private employers. The Division makes no regular inspection to prevent this, for it has neither funds nor sanctions, and accordingly responds only to complaints. *Menard* v. *Mitchell*, 328 F.Supp. at pp. 721-22. Consequently, private employers and anyone with the right kind of connections have access to these files. See "Guilt by Record," 1 *Calif. Western Law Review*, 126 (1965).

The likelihood that information will fall into unauthorized and untrained hands is fairly substantial. A study on the effect of police records of arrest on employment opportunities in the District of Columbia resulted in the publishing of the Duncan Report which found that the use of such records by prospective employers was widespread, and the

consequences severe, even if the charges were subsequently dismissed. The report found that institutional and other non-governmental employers in the District of Columbia area routinely required job applicants to obtain and provide copies of their arrest records. In *Morrow* v. *District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969), the District Court in the compliance hearing in that case found that a select group of about 50 private companies were furnished arrest records routinely upon request. A total of more than 3,500 arrest records were disseminated weekly at the time the Duncan committee studied the problem.

The widespread use of arrest records in this country for "non-criminal" purposes is a matter of general knowledge and governmental concern. In *Sampson* v. *Murray*, 415 U.S. 61 (1974), Mr. Justice Douglas in a dissenting opinion acknowledges this problem. In *Menard* v. *Saxbe* (*supra*) and *Morrow* v. *District of Columbia* (*supra*), the United States Court of Appeals for the District of Columbia recognized and dwelt extensively on this problem, as other courts have done. The legal community through publications in legal periodicals have recognized the problem.[1]

Even the former head of the Justice Department, Attorney General William B. Saxbe, has recognized the critical

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[1] The seriousness of the arrest record problem is now too well documented to doubt. See some of the following: "The Arrest Record and New York City Public Hiring: An Evaluation," 9 *Columbia Journal of Law and Social Problems*, 442 (1973); Karabian, "Record of Arrest: The Indelible Stain," 3 *Pacific Law Journal* 20 (1972); "Branded: Arrest Records of the Unconvicted," 44 *Mississippi Law Journal* 928 (1973); "Discriminatory Hiring Practices Due to Arrest Records—Private Remedies," 17 *Villanova Law Review* 110 (1971); and "Davidson v. Dill: A Compelling State Interest in Retaining Arrest Records," 35 *University of Pittsburgh Law Review* 205 (1973).

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nature of the problem and the need for prompt action. In testimony before the House Subcommittee on Civil Rights and Constitutional Rights of the Judiciary on February 26, 1974, he stated:

> "However, people are often denied employment on the basis of mere arrest records—records which are provided by criminal justice information systems. This is fundamentally unfair and must be stopped."

Saxbe goes on to quote the following excerpt from the National Advisory Commission on Criminal Justice Standards and Goals, *Report on the Criminal Justice System:*

> "No longer is it possible to rely on the inefficiency of information systems for the protection of privacy. Computer-based information systems require conscious planning for protection of personal privacy. Constraints must be imposed on the system to ensure the highest practicable level of protection is obtained."

Saxbe implied that the present system's security is not sufficient to protect the records and prevent unauthorized inputs and dissemination; hence, the need for comprehensive federal legislation. He then states:

> "It is, of course, readily apparent that where a system does not have the proper security there is a grave danger that the individual rights of privacy may be compromised."

The list of examples where arrest records are disseminated and then misused is practically endless; the point being, that the practice of disseminating arrest records is open and subject to great abuse, which has a severe and damaging effect upon an individual by circumventing a basic premise and foundation stone of our criminal justice

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system. Only a conviction should carry legal significance as to a person's involvement in criminal behavior. Where an individual is found not guilty by a court of law, dissemination of his arrest record places him in an "extra judicial" double jeopardy by having him face a "second trial" in which he must prove his innocence to all with access to his record against a presumption of being associated with criminal behavior. Those having a record disseminated suffer a deprivation of rights and opportunities without a trial, without witnesses, without a chance to defend themselves—in short, without due process of law.

B. The Order Denying Expungement of Petitioner's Record of Arrest is a deprivation of petitioner's right of privacy protected by the Constitution; more particularly, the Fifth Amendment concept of personal liberty and the Due Process clause.

The government's continuing retention and the possible dissemination of the record of arrest endangers a fundamental right of privacy long recognized as inherent in our constitutional form of government. Referring to an earlier English case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765), the Court in *Boyd* v. *United States*, 116 U.S. 616 (1886), at page 630 stated:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion

of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of his sacred right which underlies and constitutes the essence of Lord Camden's judgment. * * * "

In the recent decision of *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court recognized that the right of privacy does exist under the Constitution. Mr. Justice Blackmun stated at page 152:

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, *id.*, at 486, 85 S.Ct., at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be

> deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy."

Many of the above mentioned cases, or the basic principles found in these cases, have been cited in several recent state and federal decisions applying the principle of the right of privacy in the arrest record area, particularly under the Fifth Amendment due process clause.[2]

Due process is an elusive concept and its exact boundaries are undefined; its content varies according to specific factual context. Mr. Justice Fortas in the *Application of Gault*, 387 U.S. 1 (1967), stated at page 20:

> "Due Process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

In *United States* v. *Robel*, 389 U.S. 258 (1967), the Court was concerned with the constitutionality of a Congressional Act relating to subversive activities. In Footnote 11, Mr. Chief Justice Warren wrote:

> "We recognized in Greene v. McElroy, 360 U.S., at 492, 79 S.Ct. at 1411, 3 L.Ed.2d 1377, that 'the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment.' "

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[2] *Doe* v. *Commander*, 329 A.2d 35 (Md. Ct. App. 1974); *Davidson* v. *Dill*, 503 P.2d 156 (Col. 1972); *State* v. *Pinkley*, 290 N.E.2d 923 (Ohio Com. Pl. 1972); *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971); *Menard* v. *Mitchell*, 328 F.Supp. 218 (D.C. 1971); *Menard* v. *Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

The opinion goes on to state at page 265:

> "It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' "

Petitioner contends that the government's retention of his arrest record violates his rights of liberty, property, and privacy within the Fifth Amendment. His liberty has been infringed upon by placing him in an unequal position to other law abiding citizens. His property rights and freedom of practicing his chosen profession are jeopardized by the administrative practice of the Federal Bureau of Investigation of disseminating arrest records; and his right of privacy is threatened by such dissemination.

C. Where certain fundamental rights are involved, regulations limiting these rights may be justified only by a compelling state interest.

Mr. Justice Harlan in *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288 (1964), stated at page 307:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See [N.A.A.C.P. v. State of Alabama] 357 U.S. at 463-464, 78 S.Ct. at 1172-1173. ' * * * [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 903. ' * * * [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'

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> Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231; (Footnote omitted)."

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), Mr. Justice Douglas in writing the opinion of the Court, reaffirmed this holding of the Court at page 485 and extended it to the concept of right of privacy. Mr. Justice White in a concurring opinion in *Griswold* v. *Connecticut* (*supra*) stated at 381 U.S., at 503:

> "The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny,' Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110. . . ."

Mr. Justice Goldberg, whom the Chief Justice and Mr. Justice Brennan joined, concurring, stated at page 497:

> "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' McLaughlin v. State of Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155."

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The latest decision of the Court in this area is *Roe* v. *Wade* (*supra*), where Mr. Justice Blackmun issued a clear mandate with regard to legislation limiting fundamental rights—more particularly, the right of privacy. Mr. Justice Blackmun at page 155 stated:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' Kramer v. Union Free School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485, 85 S.Ct., at 1682; Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940); see Eisenstadt v. Baird, 405 U.S., at 460, 463-464, 92 S.Ct., at 1042, 1043-1044 (White, J., concurring in result)."

The United States Court of Appeals for the Tenth Circuit in its opinion in the case now brought before this Court on a petition for writ of certiorari avoided entirely the issue raised by Petitioner that the government must demonstrate a compelling state interest in retaining the arrest record under the statute and regulation authorizing retention. Instead, the Court of Appeals implied that the burden was on Petitioner to demonstrate an invasion of privacy sufficient to override the government's justification for retaining his record (App. B, page vi).

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The value of an arrest record and fingerprints depends upon two factors: an assumption that the individual arrested did in fact commit the crime for which he was arrested, and that his commission of this crime indicates a likelihood that other crimes will be committed. *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971). Petitioner's acquittal negates both premises. He has committed no crime, he has been found not guilty in a trial by jury, and retention of his record of arrest cannot be justified as criminal identification. The very nature of the crimes the Petitioner was charged with by the government are not of the clandestine type where records of arrest and fingerprints are necessary to facilitate future investigations. Criminal investigation and the interests of society are not subserved by the retention of Petitioner's record of arrest.

The Washington Court of Appeals in *Eddy* v. *Moore* (*supra*) stated at 487 P.2d at 217:

> "The courts have recognized in *Kalish* and *Menard* that following an acquittal, the scales of justice required the balancing on one side of a plaintiff's legitimate concern over the improper use of, labeling, or existence of his fingerprints, photographs, and arrest records against the government's bald assertion of a right to hold them. We have now reached the point where our experience with the requirements of a free society demands the existence of a right of privacy in the fingerprints and photographs of an accused who has been acquitted, to be at least placed in the balance, against the claim of the state for a need for their retention.
>
> "We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an

> acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights 'formed by emanations from these guarantees that help give them life and substance.' Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
>
> "It will take a compelling showing on the part of the state to justify a retention of the fingerprints and photographs. * * * "

The systematic recordation and dissemination of information on an individual is a form of surveillance and control which has a chilling effect on the freedoms upon which the government is founded—life, liberty and the pursuit of happiness as well as due process under the law. Where the government engages in such conduct which clearly invades an individual's right of privacy, its action cannot be permitted unless it can show a compelling public necessity in its action. *Menard* v. *Mitchell*, 328 F.Supp. at 726.

While some conduct against society may properly subject an individual to limitations upon his freedoms and right of privacy, such as conviction for criminal acts, where charges are made without adequate supporting evidence as tested by the judicial process, the records of arrest should not be indiscriminately broadcast under governmental auspices. Developments in technological ability to accumulate and disseminate information on individuals is a growing concern of society and the law which must be met by the courts with the constitutionally recognized right of privacy to insure basic freedoms guaranteed by our democracy. *Menard* v. *Mitchell*, 328 F.Supp. at 725.

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II.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT SHOULD HAVE REMANDED THE CASE FOR AN EVIDENTIARY HEARING.

Reproduced as Appendix E to this petition is the petition for rehearing filed by Petitioner in the United States Court of Appeals for the Tenth Circuit. In said petition, the Appellate Court's attention was called to that portion of the record on appeal indicating a request to the District Court for an evidentiary hearing which was in effect overruled by the District Court issuing its order denying expungement (Appendix C).

The Court of Appeals in its opinion (Appendix B) relied heavily upon the lack of showing of a demonstrated invasion of privacy in determining that the arrest record should not be expunged (App. B, page vi). Petitioner also brought to the Appellate Court's attention the argument raised in Petitioner's brief before it that the government had the burden of demonstrating a compelling state interest in retaining the record of arrest which could only be shown in an evidentiary hearing.

There must be a showing on a case by case basis how far the government may infringe upon an individual's right of privacy in the area of arrest records, and the Court of Appeals' decision acknowledges such a method (App. B, page 5). Both sides must be given a fair opportunity to present evidence in their own behalf, whether it be incumbent upon the Petitioner to show a violation of his right of privacy and no governmental interest in retaining his arrest record as the Court of Appeals determined, or upon the

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government to show a compelling state interest in retaining the record of arrest as the Petitioner contends.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES P. LINN, *pro se*
of
LINN, HELMS & KIRK
410 Fidelity Plaza
Oklahoma City, Oklahoma 73102

June, 1975

APPENDIX A

MARCH TERM — MAY 12, 1975

Before Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	No. 74-1397
	)	
JAMES P. LINN,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed April 25, 1975, in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

PUBLISH

FILED
APR 9 1975
HOWARD K. PHILLIPS
Clerk, United States
Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 74-1397

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES P. LINN, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Oklahoma. (D. C. No. CR-73-131)

Charles R. Hollen, Attorney, Department of Justice (Gary D. Jackson, Attorney, Department of Justice, on the brief), for Plaintiff-Appellee.

James P. Linn (Linn, Helms & Kirk, and Mark A. Robertson, Legal Intern, on the brief), for Defendant-Appellant.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is an appeal from an order of the trial court denying the defendant's motion to expunge, remove and destroy the record of his arrest. Under the circumstances disclosed by the record here before us, we affirm the action of the trial court.

James P. Linn, an attorney-at-law licensed to practice in the State of Oklahoma, appears in this court pro se. Linn and seven others were indicted by a grand jury sitting in the Southern District of New York. The indictment contained some sixty-five counts, charging, among other things, conspiracy, mail fraud, wire fraud, stock fraud, sale of unregistered securities, and the filing of false reports with the Securities and Exchange Commission and the American Stock Exchange. Linn was a named defendant in fifty-nine of the sixty-five counts in the indictment.

Subsequent to the return of the aforesaid indictment, Linn was arrested and fingerprinted by the United States Marshal for the Southern District of New York.

Linn and four other defendants requested a change of venue to the Western District of Oklahoma. This request was granted. Trial of the case was to a jury, and of the fifty-nine counts naming Linn as a defendant, nine were submitted to the jury. The remaining counts were either dismissed or in some manner consolidated with the nine counts submitted to the jury.

The jury acquitted Linn on each of the nine counts submitted to it. Linn then filed in the criminal proceeding in which he had been thus acquitted a motion requesting the trial court to expunge, remove and destroy the record of his arrest. In this motion Linn alleged as grounds therefor that most of the charges against him had been dismissed prior to and during trial, and that he had been acquitted by the jury on all remaining counts of the in-

dictment. Linn further alleged in his motion to expunge: (1) that future misuse and improper dissemination of his record of arrest was "likely"; (2) that the record of his arrest "could be" used to attack his character and reputation both as an individual and in his professional capacity as an attorney-at-law; (3) that Linn's arrest record in no-wise serves to protect society, so that any conceivable public interest in retaining the record of arrest is clearly outweighed by the possible adverse consequences to him and his professional practice; and (4) that expungement of the record of his prior arrest is necessary to insure his constitutional right of privacy.

No evidentiary hearing was held, or apparently requested, in connection with Linn's motion to expunge, though the matter was fully briefed by both Linn and the Government. The trial court then denied Linn's motion to expunge his record of arrest, and this appeal follows.

Traditionally, courts have been of the view that the matter of expunging an arrest record where the arrestee has been acquitted was inappropriate for judicial action, and that the entire matter was more appropriate for legislative action. United States v. Dooley, 364 F.Supp. 75, at 79 (E.D.Pa. 1973). However, there are a number of comparatively recent cases which indicate quite clearly that in a proper case the courts may themselves order an expunction of an arrest record. Requests to expunge have arisen in a variety of procedural settings. For example, requests to expunge are frequently made as a part of the relief requested in civil rights proceedings, of one type or another, brought against state or county officials. *See* Sullivan v. Murphy, 478 F.2d 938 (D.C.Cir. 1973), *cert. denied*, 414 U.S. 880 (1973); Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Herschel v. Dyra, 365 F.2d 17 (7th Cir. 1966); Bilick v. Dudley, 356 F.Supp. 945 (S.D.N.Y. 1973); Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C. 1969), *vacated* on

other grounds, 401 U.S. 987 (1971); and Hughes v. Rizzo, 282 F.Supp. 881 (E.D. Pa. 1968).

Requests to expunge arrest records have also been frequently made in postconviction proceedings. *See* Rogers v. Slaughter, 469 F.2d 1084 (5th Cir. 1972); Kowall v. United States, 53 F.R.D. 211 (W.D.Mich. 1971); and Severson v. Duff, 322 F.Supp. 4 (M.D.Fla. 1970).

Similar requests have also been made in actions brought directly against the actual custodian of the records sought to be expunged. *See* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Gomez v. Wilson, 323 F.Supp. 87 (D.C.D.C. 1971); Davidson v. Dill, 503 P.2d 157 (Colo. 1972); and Eddy v. Moore, 487 P.2d 211 (Wash.App. 1971).

Finally, requests to expunge have been made, as in the instant case, in the criminal proceeding in which the arrestee was acquitted. *See* Morrow v. District of Columbia, 417 F.2d 728 (D.C.Cir. 1969); United States v. Seasholtz, 376 F.Supp. 1288 (N.D.Okla. 1974); United States v. Dooley, 364 F.Supp. 75 (E.D.Pa. 1973); United States v. Rosen, 343 F.Supp. 804 (S.D.N.Y. 1972); and United States v. Kalish, 271 F.Supp. 968 (D.Puerto Rico, 1967).

Under the authorities above cited it is fairly well established, then, that courts do possess the power to expunge an arrest record where the arrestee has been acquitted. However, there appears to be no definitive, all-purpose rule to govern requests of this nature, and to a considerable degree each case must stand on its own two feet. The cases above cited do indicate that the power to expunge an arrest record is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case. Certain of the cases call for a "balancing" of the equities between the Government's need to maintain extensive records in order to aid in general law enforcement and the individual's right of privacy.

Under the cases above cited, where the arrest itself was an unlawful one, or where the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional, courts have ordered expunction. However, it would appear that an acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record. United States v. Seasholtz, 376 F.Supp. 1288 (N.D.Okla. 1974); United States v. Dooley, 364 F.Supp. 75 (E.D.Pa. 1973); and United States v. Rosen, 343 F.Supp. 804 (S.D. N.Y. 1972). Let us examine the facts of the instant case in the light of the authorities above mentioned.

Linn's arrest was a lawful one, pursuant to an indictment returned by a duly constituted grand jury sitting in the Southern District of New York. The charges set forth in the indictment were lawful ones not subject to any constitutional infirmity. Although Linn was no doubt severely inconvenienced by the return of the indictment, there is nothing to indicate any harassing action, as such, by any governmental agency. On trial of the matter, the trial judge held there was sufficient incriminating evidence against Linn to require submission of at least nine counts to the jury. And in acquitting, the jury found, in effect, only that the Government had not proven Linn's guilt beyond a reasonable doubt.

Linn argues on appeal that the Government's retention of his arrest records is an invasion of his right of privacy. There was no showing, however, that the retained records have been, or will be, used improperly or intrusively against Linn. In fact, the so-called "arrest" record now on file with the F.B.I. clearly shows Linn was found not guilty of the charges against him. Thus, there is no demonstrated invasion of privacy which overrides the Government's justification in keeping the records.

So, the instant case really boils down to whether the fact that Linn was acquitted is in itself sufficient to require

the trial court to expunge his record of arrest. We hold that it is not.

Judgment affirmed.

APPENDIX C

FILED
MAY 29 1974
REX B. HAWKS
Clerk, U. S. District Court
By Zeta M. Cowan
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff;	)	
vs.	)	
	)	No. CR-73-131
JAMES P. LINN,	)	
EDWARD J. BOLKA,	)	
JIMMIE E. MADOLE, et al.,	)	
	)	
Defendants.	)	

ORDER

Each of the Defendants James P. Linn, Edward J. Bolka and Jimmie E. Madole has moved for an Order for the expunction or sealing of the records and all accompanying pertinent materials relating to records of his arrest concerning alleged criminal offenses under federal law which were dismissed prior to trial or of which he was acquitted after trial in the United States District Court for the Western District of Oklahoma in Criminal Case No. 73-131. They

have filed exhaustive briefs in support of their respective Motions and in reply to the Government's response.

After thorough consideration of the Motions and briefs and after exhaustive research on the part of the Court and following a careful reading of the opinions in all reported federal cases, the Court finds that the Motion of each Defendant to expunge or to seal the record of his arrest presently in the hands of all governmental agencies should be denied. Accordingly,

IT IS ORDERED that the respective Motions of the Defendants James P. Linn, Edward J. Bolka and Jimmie E. Madole for an Order to expunge or to seal, in the hands of all governmental agencies, the record of their arrests for alleged crimes in violation of the laws of the United States and respecting which alleged crimes motions to dismiss were sustained or verdicts of acquittal were returned following trial in criminal cause no CR-73-131 in the District Court of the United States for the Western District of Oklahoma, be and the same are hereby denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 29th day of May, 1974.

s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

ATTEST: A true copy of the original
Rex B. Hawks, Clerk

By s/ Judith E. Morgan
Deputy

APPENDIX D

Subpart P—Federal Bureau of Investigation

CROSS REFERENCE: For regulation pertaining to the Federal Bureau of Investigation, see Part 3 of this chapter.

§ 0.85 General functions.

Subject to the general supervision and direction of the Attorney General, the Director of the Federal Bureau of Investigation shall:

(a) Investigate violations of the laws of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency.

(b) Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies.

(c) Conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise.

(d) Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15 1953, designating the Federal Bureau of Investigation to take charge of in-

vestigative work in matters relating to espionage, sabotage, subversive activities, and related matters.

(e) Establish and conduct law enforcement training programs to provide training for State and local law enforcement personnel; operate the Federal Bureau of Investigation National Academy; develop new approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and assist in conducting State and local training programs, pursuant to section 404 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 204.

(f) Operate a central clearinghouse for police statistics under the Uniform Crime Reporting Program, and a computerized nationwide index of law enforcement information under the National Crime Information Center.

(g) Operate the Federal Bureau of Investigation Laboratory, to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service.

(h) Make recommendations to the Civil Service Commission in connection with applications for retirement under 5 U.S.C. 8336(c).

(i) Investigate alleged fraudulent conduct in connection with operations of the Federal Housing Administration and other alleged violations of the criminal provisions of the National Housing Act, including section 1010 of title 18 of the United States Code.

(j) Exercise the power and authority vested in the Attorney General by section 201 of the Department of Justice Appropriation Act, 1973, Public Law 92-544, 86 Stat. 1115, to approve exchanges of identification records with

State and local governments for purposes of employment and licensing.

[Order No. 423-69, 34 F.R. 20388, Dec. 31, 1969, as amended by Order No. 498-12, 37 F.R. 25917, Dec. 6, 1972]

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
-vs-	)	No. 74-1397
	)	
JAMES P. LINN, et al.,	)	
	)	
Defendants-Appellant.	)	

PETITION FOR REHEARING

The appellant, James P. Linn, respectfully petitions this Honorable Court for a rehearing of the above entitled cause with respect to remanding said cause to the Western District of Oklahoma for an evidentiary hearing for the purpose of demonstrating a violation of appellant's right of privacy and to show that there is no overriding Government justification for retaining appellant's arrest record.

James P. Linn reserves his argued position as to each of the points of appeal, but in this petition, addresses himself solely to the issue of whether this Court's opinion rests heavily upon the lack of evidence in the record directed towards the right of privacy issue and the Government's interest in retaining arrest records issue, and whether appellant should be granted a remand for an evidentiary hearing.

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[APPENDIX]

This Court erred with respect to its statement on page 3 of its opinion that "no evidentiary hearing was held, or apparently requested, in connection with Linn's motion to expunge. . . ." The appellant calls to the Court's attention, Vol. I, page 82 of the Record on Appeal where the appellant states:

> "The ex-defendant, James P. Linn, therefore prays that the Court order expungement of his record of arrest on the basis of the above mentioned facts and cited authority. *Further, the defendant requests that should the Court deem that more material or evidence is necessary for a just determination of this motion, he be granted an evidentiary hearing with sufficient time to prepare for it.*" [Emphasis added]

The District Court failed to act on appellant's request for an evidentiary hearing and by issuing its order denying the requested relief for expungement, it in effect overruled the request for an evidentiary hearing.

This Court's opinion relies heavily upon the lack of showing or demonstrated invasion of privacy in determining that the record should not be expunged (page 6 of the opinion). The Government, by attachment as an Appendix to its Brief, introduced the arrest record on file at the F.B.I. without the benefit of an evidentiary hearing to determine its accuracy, its value to the F.B.I., or any overriding Government interest in its retention. The appellant contends that the consideration of only the arrest record, without the opportunity for appellant to present evidence to support his position, denies appellant a fair opportunity to have his position justly adjudicated.

Appellant contended in his appellate briefs and still contends that under constitutional tests propounded by the Supreme Court in recent years [*Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)] any regulations limiting fundamental rights may be justified only by a compel-

ling state interest. This can only be shown in an evidentiary hearing wherein the Government interest in arrest records is shown and balance against the individual's right of privacy. There must be a showing on a case by case basis how far the Government may infringe upon the right of privacy of an individual citizen. This Court's opinion supports this case by case method of determination (page 5) and in order to arrive at a just result, evidence must be presented.

The appellant, James P. Linn, therefore states that a request for an evidentiary hearing was made by appellant but denied by the District Court, and that in order for a just determination of the issues before the Court and to be consistent with the Court's opinion this action should be remanded to the Western District of Oklahoma for an evidentiary hearing.

Respectfully submitted,

s/ James P. Linn
James P. Linn, pro se
of
LINN, HELMS & KIRK
Suite 410 Fidelity Plaza
Robert S. Kerr at Robinson
Oklahoma City, Oklahoma 73102
(405) 239-6786

CERTIFICATE OF MAILING

This will certify that the undersigned mailed two true and correct copies of the above and foregoing Appellant's Petition for Rehearing to Mr. Charles R. Hollen, Attorney, U. S. Department of Justice, P. O. Box 14142, Washington, D. C. 20044, this 23rd day of April, 1975, with postage fully prepaid thereon.

s/ James P. Linn
James P. Linn

CERTIFICATE OF MAILING

I hereby certify that on the ..... day of June, 1975, three true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed air mail, return receipt requested, to each of the following: The Solicitor General, Department of Justice, Washington, D. C. 20530, Charles R. Hollen, Attorney, and Gary D. Jackson, Attorney, United States Department of Justice, Box 14142, Washington, D. C. 20044.

The above listed parties are all of the parties required to be served.

.....

James P. Linn

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1559

JAMES P. LINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following his acquittal by a jury of criminal charges, petitioner seeks to have the record of his arrest expunged.

On December 20, 1972, a grand jury in the Southern District of New York returned a 65-count indictment charging petitioner and seven others with conspiracy, mail fraud, wire fraud, stock fraud, sale of unregistered securities, and filing false reports with the Securities and Exchange Commission and the American Stock Exchange. Petitioner was charged in 59 of the 65 counts (Pet. App. B, p. iii). Subsequent to the return of the indictment, petitioner was arrested and fingerprinted (*ibid.*).

The case against petitioner and four other defendants was transferred to the Western District of Oklahoma. Trial was held before a jury. Of the 59 counts naming petitioner, nine were submitted to the jury, the others

either having been dismissed or consolidated with the remaining nine counts. Petitioner was acquitted on all counts submitted to the jury (Pet. App. B, p. iii).

Following his acquittal, petitioner moved that his arrest record be expunged. He alleged that most of the charges against him had been dismissed either prior to or during trial and that he had been acquitted on all remaining counts. He claimed further that future misuse and improper dissemination of his arrest record was likely; that his arrest record could be used to attack his character and reputation both as an individual and in his professional capacity as an attorney; that maintenance of his arrest record would not serve the interests of society and would have adverse consequences on him and his law practice; and that expungement of his arrest record was necessary to protect his constitutional right of privacy (Pet. App. B, pp. iii-iv).

No evidentiary hearing was held on petitioner's motion to expunge. However, the issue was fully briefed by petitioner and the government. The trial court denied the motion (Pet. App. C, pp. vii-viii), and the court of appeals affirmed (Pet. App. B, pp. ii-vii).

1. 28 U.S.C. 534 requires the Attorney General to "acquire, collect, classify, and preserve * * * criminal identification, crime, and other records."[1] Arrest records are

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[1]28 U.S.C. 534 provides:

(a) The Attorney General shall-

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

among the criminal identification records required to be retained pursuant to this statute. See *Tarlton* v. *Saxbe*, 507 F.2d 1116, 1122 (C.A. D.C.); *Menard* v. *Saxbe*, 498 F.2d 1017, 1021, 1026 n. 28, 1028 n. 42, 1029-1030 (C.A. D.C.); *Sullivan* v. *Murphy*, 478 F.2d 938, 971 (C.A. D.C.), certiorari denied, 414 U.S. 880; *Menard* v. *Mitchell*, 430 F.2d 486, 488-490 (C.A. D.C.); *United States* v. *Seasholtz*, 376 F. Supp. 1288, 1289 (N.D. Okla.); *United States* v. *Rosen*, 343 F. Supp. 804, 806 (S.D. N.Y.).

The Attorney General has delegated to the Federal Bureau of Investigation the responsibility of collecting, preserving, and, in proper circumstances, exchanging such identification records. See 28 C.F.R. 0.85(b).[2] Significantly, there is no comparable statutory authority or regulation providing for the destruction of criminal identification records.[3] Thus, Congress intended that, under ordinary circumstances, arrest records are to be retained.

The question thus is whether there are any special or unusual circumstances in this case that would justify expungement of petitioner's arrest record. The mere fact that petitioner was acquitted of the offenses with which he was charged is not a sufficient reason, since an acquittal does not necessarily reflect upon the validity of the arrest but means only that the defendant's guilt was not established beyond a reasonable doubt. See,

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[2]This regulation is reproduced as Appendix D to the petition for certiorari. See App. D, pp. ix-xi.

[3]When Congress has intended that criminal records be expunged, it has so provided in a specific statute. See, *e.g.*, 18 U.S.C. 5021 (Youth Corrections Act); 21 U.S.C. 844(b) (Controlled Substances Act).

e.g., United States v. *Dooley*, 364 F. Supp. 75, 78 (E.D. Pa.).[4] Moreover, petitioner has not shown that his indictment and arrest were not based upon probable cause, or that his arrest was otherwise illegal or the product of police harassment. Nor is this a case involving police detention not rising to the level of arrest or an arrest followed by a failure of the prosecutor or grand jury to file charges.

In the absence of such special circumstances, the courts have concluded that 28 U.S.C. 534 requires retention of arrest records and that expungement should not be ordered. See *Tarlton* v. *Saxbe, supra*, 507 F.2d at 1122-1125; *Sullivan* v. *Murphy, supra*, 478 F.2d at 968-971; *Menard* v. *Mitchell, supra*, 430 F.2d at 492-493; *United States* v. *McLeod*, 385 F.2d 734, 748-750 (C.A. 5); *United States* v. *Rosen, supra*, 343 F. Supp. at 806, 808-809.

Petitioner's primary concern is not with F.B.I. retention of his arrest record but with its dissemination. He does not claim that the F.B.I. itself is likely to disseminate his arrest record improperly or to unauthorized persons,[5] but only that, once it is disseminated to authorized agencies or personnel, the F.B.I. lacks control over its use.

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[4]This distinction might be significant in some contexts, justifying retention and use of an arrest record of one who has been acquitted of a criminal charge. For example, in some circumstances a federal employee might properly be discharged from his job on the basis of evidence identical to that which formed the basis of a criminal charge of which he was acquitted. See, *e.g., Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin*, 344 F.2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883.

[5]Records disseminated by the F.B.I. are designated "for official use only" and are not furnished by the F.B.I. to private individuals. See *Menard* v. *Saxbe, supra*, 498 F.2d at 1022, 1026 n. 28. However, 28 C.F.R. 0.85(b) does provide for dissemination of F.B.I. records to governmental agencies, railroad police and certain banking institutions.

28 U.S.C. 534(b) expressly authorizes the Attorney General to cancel the exchange of records if local agencies make records available to unauthorized users; "and the Bureau recognizes its obligations to review this participation by local authorities." *Menard* v. *Saxbe, supra,* 498 F.2d at 1028.[6] Petitioner's arrest record on file with the F.B.I. is accurate and indicates that petitioner was acquitted of the charges against him (Gov't. App. C).[7] Thus, there is reasonable assurance that petitioner's record will not be improperly disseminated, and those who do see it will be apprised of the fact that petitioner was acquitted. In such circumstances, none of the reasons suggested by petitioner for expungement—including the possible misuse of his record and the potential adverse impact upon his personal and professional life—are substantial enough to "prevent the FBI from disseminating accurate criminal records or,

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[6]Congress has indicated a further awareness of the problem of the impact of improper dissemination of government records on individuals. In the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, effective September 27, 1975, there are procedures for individual inspection of one's records and for seeking amendments to those records to ensure accuracy and safeguards against improper and unauthorized disclosure. Furthermore, two bills presently before Congress (H.R. 62 and S. 1428) deal specifically with criminal justice information, including arrest records. Both bills would strictly limit and monitor the dissemination of government records and provide criminal penalties for those guilty of unauthorized dissemination. Furthermore, those bills provide for the sealing and expungement of arrest records where there has been an acquittal. Under H.R. 62, Section 208(b)(1)(C), such records will be sealed within two years of the arrest; under S. 1428, Section 207(c), such records can be sealed in accordance with Federal or State statutes or upon order of a court of competent jurisdiction. However, neither bill would require immediate expungement of arrest records merely because an acquittal occurs.

[7]"Gov't. App. C." petitioner's F.B.I. identification record, refers to Appendix C to the Government's Brief in the court of appeals.

indeed, from disseminating inaccurate records after taking reasonable measures to safeguard accuracy, and thus these considerations do not interfere with legitimate law enforcement objectives." *Tarlton* v. *Saxbe, supra,* 507 F.2d at 1126.[8]

As one court has stated in a related context:

> That they have been forcibly restrained of their liberty as a result of the encounters in question is an historical fact. No system of law can, with in-

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[8]Petitioner asserts that the government must demonstrate a compelling interest in maintaining his arrest record in light of the fundamental nature of the right being infringed, which he alleges to be the right of privacy. However, the retention and proper dissemination of the record of a valid arrest serves legitimate governmental functions, such as providing information to law enforcement officials for investigatory purposes, which may not only aid in finding the guilty but in clearing the innocent; providing relevant information to the courts and corrections agencies; and providing reliable data to law enforcement agencies which may serve as the basis for research or show trends enabling the police to utilize their resources more efficiently and thereby curb the spread of crime. See, *e.g., Herschel* v. *Dyra,* 365 F. 2d 17, 20 (C.A. 7), certiorari denied, 385 U.S. 973; *United States* v. *Rosen, supra,* 343 F. Supp. at 809; *United States* v. *Dooley, supra,* 364 F. Supp. at 77. See also n. 4, *supra.* As for the right of privacy, dissemination in the manner prescribed by statute and regulation adequately protects privacy rights and, in any event, petitioner's particular claim is speculative at most.

Petitioner's reliance upon *Eddy* v. *Moore,* 5 Wash. App. 334, 487 P.2d 211, is misplaced. The *Eddy* case stressed the "rogue's gallery" photograph aspect of arrest records and their potential harm (487 P.2d at 216) (a factor not in issue here), and is thus factually distinguishable on that basis. Moreover, the court in *Eddy* relied upon two federal cases that, we submit, do not support that court's expansive view of the right to privacy in the expungement context. *Menard* v. *Mitchell, supra,* involved not an arrest followed by an acquittal, but rather an arrest later classified as a "detention only." While the arrest record there was expunged, the order was based upon statutory, not constitutional, grounds. Similarly, in *United States* v. *Kalish,* 271 F. Supp. 968 (D. P. R.), the record was expunged due to special circumstances arising from the failure to charge the arrested person with any crime. The language concerning expungement following an acquittal was dictum.

> tegrity, lend or appear to lend its aid to an unreal denial of the events, particularly as such denials may affect the lawful judgment of other persons who may in the future deal with them. It is one thing to say that the system of law will legally ignore an acknowledged fact and perhaps, pursuant to specific legislation, indulge in a fiction that what was once a conviction or a criminal charge shall no longer be deemed such; but it is quite another to assist in rewriting history at the expense of truth, particularly where, as outlined above, the full truth if effectively recorded can preserve the integrity of the individual as well as the rule of law. [*Spock* v. *District of Columbia*, 283 A. 2d 14, 20 (D.C. App.); footnote omitted.]

2. Petitioner also claims that the court of appeals should have remanded the case to the district court for an evidentiary hearing. An evidentiary hearing was not required, however, because petitioner did not indicate to the district court that he had additional evidence to present; rather he asked the court to grant his motion on the facts and authorities he had already presented unless the court itself concluded that the presentation of further evidence was required. Moreover, as evidenced by his petition for rehearing (Pet. App. E, pp. xi-xiii), petitioner has not indicated what further relevant evidence he was prepared to present beyond that already set forth in his pleadings. Since the issue involved was a legal one and the pertinent facts and authorities had been fully presented to the district court, the latter correctly concluded that no evidentiary hearing was required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

SUPREME COURT, U. S.

FILED

SEP 26 1975

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1559

JAMES P. LINN,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER JAMES P. LINN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September, 1975

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This brief is respectfully submitted in reply to the Memorandum for the United States in Opposition and addresses itself to arguments first raised in said memorandum in opposition under Rule 24 of the Supreme Court Rules.

1. Petitioner's primary concern, notwithstanding the Solicitor General's statement at page 4 of his memorandum to the contrary, is with his privacy and the continuing existence of potentially damaging records which serve no compelling legitimate function. The question is not whether there are special or unusual circumstances in this case to

justify expungement of petitioner's arrest record, it is more fundamental than that. The question which petitioner has now presented through three levels of federal courts and which the Government has ignored to date is the question of a right of privacy, free of unreasonable restraints. Is there a compelling state interest in retaining the arrest records of the individual acquitted of the crime with which he was charged?

The Solicitor General states beginning at page 3 of his memorandum:

> "The mere fact that petitioner was acquitted of the offenses with which he was charged is not a sufficient reason, since an acquittal does not necessarily reflect upon the validity of the arrest but means only that the defendant's guilt was not established beyond a reasonable doubt. See, e.g., *United States* v. *Dooley*, 364 F.Supp. 75, 78 (E.D. Pa.)."

Petitioner can find no support for such a statement in the *Dooley case*. In point of fact, the *Dooley* case presents strong language in support of the petitioner's position and the court determined not to expunge the arrest record only because of the practical administrative inconvenience on the bureaucracy if the stage were set for expungement in similar cases. *United States* v. *Dooley*, 364 F.Supp. at 79. That court states in 364 F.Supp. at 77:

> "Unresolved arrest records generally may well have significance for law enforcement purposes. They provide legitimate leads and questionable background information and may properly assist in resolving criminal actions. But charges resulting in acquittal clearly have no legitimate significance. Likewise, other charges which the government fails or refuses to press or which

it withdraws are entitled to no greater legitimacy. They lose any tendency to show probable cause and should not be boot-strapped into any unearned and undeserved significance. Actually, a collection of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standards of constitutional fairness to an individual and, along with records resulting in an acquittal are not entitled to any legitimate law enforcement credibility whatsoever."

And beginning at page 78:

"Even assuming that the adverse information never falls into 'unauthorized' hands, the fact remains (1) that the information is valueless if its retention is based upon some theory of law enforcement assistance to the police at any level since it has been determined to be unfounded in law; (2) that it cannot form the basis for any legitimate law enforcement investigation; (3) that the use of this information by 'authorized' agencies would place the subject person at a distinct disadvantage with other citizens; (4) that the use of the information would of necessity be prejudiced specifically to the rights of the subject person as compared with the rights enjoyed by all other citizens; (5) and that such an unfair state of affairs is devoid of fair play, a violation of the constitutional right of privacy as well as of the presumption of innocence and is an affront to our sense of justice.

"Any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances could find himself charged with a violation of the law even though he may be entirely innocent of the charges. Our system of criminal justice will in due course bring out the truth and he will be cleared. But his record will not be cleared. And although he has been cleared under our laws, at any

future time the cloud of the prosecution against him will remain to all who one way or another gain access to it: be it inquiries concerning employment, security clearance, political office or investigations concerning other criminal offenses.

"And whether or not the information is disclosed, the fear of the subject person that it will be or may be is always there."

Petitioner contends that *Tarlton* v. *Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), cited several times in the Solicitor General's memorandum, is not controlling on any issue presented by the petitioner for a writ of certiorari. The court in *Tarlton* stated that "the issue of constitutional restraints on dissemination is yet to be definitely adjudicated and we, therefore, express no opinion on that issue." 507 F.2d at 1121, fn. 8.

Even a cursory reading of *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971), will reveal that petitioner's reliance is not misplaced and the distinctions drawn by the Solicitor General are illusory. The question before the Washington court in *Eddy* was whether the Seattle police could retain Harriet Eddy's fingerprint records and photographs after charges against her had been dismissed. The court in the *Eddy* case illustrated the development of the right of privacy in police records—including, but not limited to, the early development of the "rogue's gallery" photograph aspect of arrest records. The Washington court also showed development in the concept of a constitutional right of privacy, and made the following pertinent observation:

"The challenge is to determine the dimensions of that right. Few things have been as basic to our legal sys-

> tem as the presumption of innocence, until proof of guilt beyond a reasonable doubt. In fact, the very word acquittal is defined to mean 'judicially discharged from an accusation, * * * charge, or suspicion of guilt.' 1A Words and Phrases, p. 579 (perm. ed. 1964)." *Eddy* v. *Moore*, 487 P.2d at 217.

With its general discussion as background, the court then defined the question before it in 487 P.2d beginning at page 215:

> "We here deal with the question, not ruled upon by [Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970)], of the legality of the existence of a record of an acquitted person's fingerprints and photographs in police files. The determination of that question, in turn, hinges directly on whether there is a constitutional right of privacy in an acquitted person's fingerprints and photographs."

While the Washington court cited *Menard* v. *Mitchell* (*supra*) and *United States* v. *Kalish*, 271 F.Supp. 968 (D.P.R. 1967), it was only to support the proposition that "following an acquittal, the scales of justice required the balancing on one side of a plaintiff's legitimate concern over the improper use of, labeling, or existence of his fingerprints, photographs, and arrest records against the Government's bald assertion of a right to hold them." *Eddy* v. *Moore*, 487 P.2d at 217.

The Solicitor General implies in his memorandum that petitioner has a remedy if unlawful dissemination is made. Petitioner can complain to the F.B.I., if he can find out who provided the information, by reporting the disseminating agency and requesting its access privileges be terminated. Barring the unlikely event that the user would disclose

who provided the records, in practical terms, it would be impossible to determine which one of the 7,000 to 8,000 agencies with access to the F.B.I. files disseminated the records. This is of little value to the individual in redressing a wrong done to him or protecting his privacy. This "remedy" is somewhat analogous to that of closing the barn door after the horse is gone.

The practice of law is a sensitive area requiring the absolute trust and confidence by a client in his legal representation. Where the average person on the street requiring legal advice or representation would probably not seek or receive criminal arrest files, large corporations, banks, government organizations and individuals with the right kind of connections do have means at their disposal, legal and otherwise, to secure such files with little difficulty. A security officer of a corporation stated in an interview regarding his company's employment practice:

> "On the whole * * * if we could pay the fee of approximately two dollars per record search * * * I believe most police and sheriff's agencies would provide us with a rap sheet. We keep a list of all those police or sheriff's departments throughout the country that will or will not reply without a fee to our letter." "Guilty by Record," 1 *Calif. Western Law Review* (1965), 126 at 132.

2. The Solicitor General in his memorandum in opposition maintains that an evidentiary hearing was not required because petitioner did not indicate to the district court that he had additional evidence to present; and that petitioner did not indicate in his petition for rehearing to the United States Court of Appeals for the Tenth Circuit what further relevant evidence he was prepared to present.

The Court of Appeals deemed evidence of damage to the petitioner and a demonstrated invasion of privacy of sufficient import to the outcome of the controversy, by its reliance on the lack thereof, to deny the relief requested (Pet. App. A, pp. v-vi). The district court, on the other hand, presumedly deemed such evidence unnecessary to a proper determination of the controversy since it made no formal or informal response to the petitioner's request for an evidentiary hearing, and by its failure to note any grounds for its order other than a review of the briefs and reported federal opinions (Pet. App. C, p. viii). The Solicitor General's Memorandum in Opposition seems to support both the position that the hearing was unnecessary *and* that based on the facts the relief should be denied. The Solicitor General also interjects yet a third position by contending that disclosure by the petitioner of what evidence he was prepared to present would somehow be relevant to the determination of whether a hearing should have been considered (Memo. in Opp., p. 7), yet cites no authority for such a proposition.

It has been the petitioner's position that if a court determines that the controversy is not solely a question of law, then an evidentiary hearing should be granted for a just adjudication of the case, not by mere statements in briefs and exhibits attached to briefs on appeal (See Petition for Rehearing, Pet. App. E, p. xii). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385 (1914). There should be an "opportunity for hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), whether it be raised

in a question of sufficiency of notice and service [*Mullane* case (*supra*)], the availability of the judicial system to those requesting relief, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), or the necessity of an evidentiary hearing as in the controversy in question.

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

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September, 1975

CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of September, 1975, three true and correct copies of the foregoing Reply Brief of Petitioner in Support of Petition for Writ of Certiorari were mailed air mail, return receipt requested, to each of the following: The Solicitor General, Department of Justice, Washington, D.C. 20530; Charles R. Holden, Attorney and Gary D. Jackson, Attorney, Department of Justice, Box 14142, Washington, D.C. 20044.

The listed parties are all of the parties required to be served.

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James P. Linn